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4 MICHAEL WAYNE BROWDER,
5 Plaintiff,
6 v.
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8 CAROLYN W. COLVIN,
9 Defendant.
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12 Case No. 14-cv-03696-KAW
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**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; DENYING
DEFENDANT'S CROSS-MOTION FOR
SUMMARY JUDGMENT;
REMANDING CASE FOR FURTHER
PROCEEDINGS**

15 Re: Dkt. Nos. 20, 24
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Michael Wayne Browder ("Plaintiff") seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner" or "Defendant"). Pending before the Court are the parties' cross-motions for summary judgment. Having considered the papers filed by the parties and the administrative record, the Court GRANTS Plaintiff's motion for summary judgment, DENIES Defendant's cross-motion for summary judgment, and REMANDS this case for further proceedings consistent with this order.

I. BACKGROUND

A. Plaintiff's applications

On August 8, 2011, Plaintiff protectively filed a Title II application for Social Security Disability Insurance Benefits ("DIB") and a Title XVI application for Supplemental Security Income ("SSI"). (Administrative Record ("AR") at 11.) In both applications, Plaintiff alleged that he became disabled on July 1, 2009. (*Id.*) The Social Security Administration ("SSA") denied Plaintiff's applications initially and on reconsideration. (*Id.*)

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1 **B. The administrative hearing**

2 Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (*Id.* at 89.)
3 Though the request was untimely, the ALJ found good cause for the untimely request and a
4 hearing was held on November 21, 2013.¹ (*Id.* at 68.) Plaintiff, who was represented by counsel,
5 testified at the hearing, as did his partner, Thomas Williams, and a vocational expert ("VE"),
6 Stephen P. Davis. (*Id.* at 607.)

7 **C. The ALJ's decision**

8 On January 14, 2014, the ALJ issued an unfavorable decision. (AR at 11-24). In reaching
9 his decision, the ALJ followed the five-step sequential process that governs Social Security
10 disability determinations.² *See* 20 C.F.R. §§ 404.1520(a); 416.920(a). At step one, the ALJ
11 determined that Plaintiff, who met the insured status requirements through September 30, 2013,
12 had not engaged in substantial gainful activity since July 1, 2009, the alleged onset date. (AR at
13 13.) At step two, the ALJ determined that Plaintiff suffered from two severe impairments, human
14 immunodeficiency virus ("HIV") and bilateral knee pain. (*Id.*) The ALJ found that Plaintiff's
15 alleged depressive disorder and his claimed memory loss were not severe impairments. (*Id.*) At
16 step three, the ALJ determined that Plaintiff did not have an impairment that meets or medically
17 equals the severity of a listed impairment. (*Id.* at 16.)

18 Before proceeding to step four, the ALJ found that Plaintiff had the residual functional

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20 ¹ Plaintiff states that the hearing was held on August 28, 2013 though the hearing transcript
21 reflects a hearing date of November 21, 2013. *See* Pl.'s Mot. at 5; AR at 607.

22 ² At step one, the Commissioner determines whether a claimant is currently engaged in substantial
23 gainful activity. If so, the claimant is not disabled. 20 C.F.R. § 404.1520(b). At step two, the
24 Commissioner determines whether the claimant has a "medically severe impairment or
25 combination of impairments," as defined in 20 C.F.R. § 404.1520(c). If the answer is no, the
26 claimant is not disabled. If the answer is yes, the Commissioner proceeds to step three, and
27 determines whether the impairment meets or equals a "listed" impairment. 20 C.F.R. §
28 404.1520(d). If this requirement is met, the claimant is disabled; if not, the Commissioner
 proceeds to step four. At step four, the Commissioner determines whether the claimant can still
 perform "past relevant work." 20 C.F.R. § 404.1520(e). If the claimant can perform such work,
 he is not disabled. If the claimant meets the burden of establishing an inability to perform prior
 work, the Commissioner must show, at step five, that the claimant can perform other substantial
 gainful work that exists in the national economy. 20 C.F.R. § 1520(f). *Reddick v. Chater*, 157
 F.3d 715, 721 (9th Cir. 1998). The claimant bears the burden of proof in steps one through four.
 Bustamante v. Massanari, 262 F.3d 949, 953-954 (9th Cir. 2001). The burden shifts to the
 Commissioner at step five. *Id.* at 954.

1 capacity ("RFC") to perform sedentary work, lift and/or carry 10 pounds frequently and
2 occasionally, sit for six hours in an eight-hour workday, stand and/or walk for two hours in an
3 eight-hour workday, sit for up to two hours at a time, stand and/or walk for up to 45 minutes at a
4 time, and occasionally stoop, crouch, and climb ropes, ladders, and scaffolds. (*Id.* at 16.) The
5 ALJ also indicated that Plaintiff would miss one day of work per month for medical reasons. (*Id.*)
6 Based on this RFC assessment, the ALJ determined, at step four, that Plaintiff could not perform
7 his past relevant work as an electrician. (*Id.* at 21.) At step five, the ALJ found that prior to and
8 after Plaintiff's 50th birthday, and considering Plaintiff's age, education, work experience, and
9 RFC, Plaintiff acquired "work skills from past relevant work that are transferable to other
10 occupations with jobs existing in significant numbers in the national economy[.]" (*Id.* at 23.) The
11 ALJ, therefore, concluded that Plaintiff was not disabled from July 1, 2009 through the date of his
12 decision. (*Id.* at 23.)

13 Plaintiff requested that the Appeals Council review the ALJ's unfavorable decision. (*Id.* at
14 7.) The Appeals Council denied review on June 12, 2014, and the ALJ's decision became the final
15 decision of the Commissioner. (*Id.* at 4-6.)

16 **D. Plaintiff's action for judicial review**

17 Plaintiff filed his complaint in this Court on August 14, 2014, seeking judicial review of
18 the Commissioner's final decision pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). (Compl., Dkt.
19 No. 1.) He filed his motion for summary judgment on February 2, 2015. (Pl.'s Mot. Summ. J.
20 ("Pl.'s Mot."), Dkt. No. 20.) The Commissioner filed her cross-motion and opposition on April 1,
21 2015. (Def.'s Mot. Summ. J. & Opp'n ("Def.'s Opp'n"), Dkt. No. 24.) Plaintiff filed his reply on
22 April 15, 2015. (Pl.'s Reply in Support of Pl.'s Mot. Summ. J. ("Pl.'s Reply"), Dkt. No. 25.)

23 **II. LEGAL STANDARD**

24 A court may reverse the Commissioner's denial of disability benefits only when the
25 decision is 1) based on legal error or 2) not supported by substantial evidence in the record as a
26 whole. 42 U.S.C. § 405(g); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
27 evidence is "more than a mere scintilla but less than a preponderance." *Id.* at 1098. It is "such
28 relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

1 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). In determining whether the
2 Commissioner's findings are supported by substantial evidence, the court must consider the
3 evidence as a whole, weighing both the evidence that supports, and the evidence that
4 undermines, the Commissioner's decision. *Id.* "Where evidence is susceptible to more than one
5 rational interpretation, the [Commissioner's] decision should be upheld." *Ryan v. Comm'r of Soc.*
6 *Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). The court, however, may not affirm the
7 Commissioner's decision "simply by isolating a specific quantum of supporting evidence." *Id.*
8 (internal quotations and citations omitted). Furthermore, the court's review is limited to the
9 reasons the ALJ provided in the disability determination. *Connett v. Barnhart*, 340 F.3d 871,
10 874 (9th Cir. 2003); *see also Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The court "may
11 not affirm the ALJ on a ground upon which he did not rely.").

III. ANALYSIS

13 Plaintiff moves "for summary judgment, reversal of the Commissioner's final decision, or
14 remand of this [Social Security] case . . ." (Pl.'s Mot. at 1.) He argues that reversal is warranted
15 because the ALJ erred (1) in determining that Plaintiff's mental impairments were not severe by
16 applying the wrong legal standard and reaching a finding that is not supported by substantial
17 evidence, (2) by discounting Plaintiff's testimony, and the testimony his partner, Thomas
18 Williams, regarding the severity of his symptoms, and (3) in finding, without substantial evidence,
19 that Plaintiff was able to perform other work. (*Id.* at 7-8.)

20 In opposition, the Commissioner argues (1) that the ALJ properly determined that
21 Plaintiff's alleged impairments were not severe, (2) that the ALJ correctly found Plaintiff's
22 statements less than fully credible, (3) that the ALJ provided germane reasons for discounting the
23 statements made by Thomas Williams, and (4) that the ALJ properly relied on the VE's testimony.
24 (Def.'s Mot. Summ. J. at 3-17.)

25 Because the ALJ erred in reaching his adverse credibility determinations, and those
26 determinations informed his non-severity finding at step two, and in turn, the hypothetical he
27 posed to the VE at step five, the Court will first address the ALJ's credibility findings.

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1 **A. Whether the ALJ erred in reaching his adverse credibility determinations**2 1. Plaintiff's testimony

3 In evaluating a claimant's testimony regarding the severity of his symptoms, an ALJ must
4 engage in a two-step inquiry. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (citation
5 omitted). An ALJ must first "determine whether the claimant has presented objective medical
6 evidence of an underlying impairment which could reasonably be expected to produce the pain or
7 other symptoms." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (internal quotations
8 and citations omitted). At this step, a claimant need not show that his impairment "could
9 reasonably be expected to cause the severity of the symptom [he] has alleged; [he] need only show
10 that it could reasonably have caused some degree of the symptom." *Id.* (internal quotations and
11 citations omitted).

12 If a claimant meets this first prong and there is no evidence of malingering, the ALJ must
13 then provide "specific, clear, and convincing reasons" for rejecting a claimant's testimony about
14 the severity of his symptoms. *Id.* When an ALJ finds a claimant's testimony unreliable, the ALJ
15 "must specifically identify what testimony is credible and what testimony undermines the
16 claimant's complaints." *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir.
17 1999) (citations omitted). It is "not sufficient for the ALJ to make only general findings . . ." *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993) (ALJ required to point to specific facts in the
18 record which undermine a claimant's complaints).

20 At the hearing, Plaintiff testified that he was laid off from his last job because he could not
21 remember tasks or perform his work quickly due to the trouble he had "getting up and down off
22 the floor" and climbing ladders. (AR at 614.) He testified that he has knee pain and that it's
23 painful for him to sit. (*Id.* at 617, 618.) Regarding his HIV, Plaintiff stated that his numbers are
24 good, but he experiences diarrhea. (*Id.* at 618.) As to his memory problems, Plaintiff testified that
25 he has trouble remembering where he is going or where he is supposed to be, that he forgets tasks,
26 and that forgets where he parks his car. (*Id.*)

27 The ALJ found that Plaintiff's medically determinable impairments could reasonably be
28 expected to cause the alleged symptoms. (AR at 20.) The ALJ, however, also found that

1 Plaintiff's statements regarding the intensity, persistence, and limiting effects of the alleged
2 symptoms were not entirely credible. (*Id.* at 21.) The ALJ stated the reasons for that finding as
3 follows:

4 The claimant expressed to his treating provider that he was considering stopping
5 use of his HIV medication so that his health would deteriorate to the point that he
6 would be able to receive disability benefits, showing a clear intent to disregard
7 prescribed and necessary treatment for secondary gain. The claimant was also
8 counseled numerous times regarding the link between his chronic marijuana and
9 alcohol use and his alleged memory loss, yet the claimant refused to discontinue
smoking marijuana and drinking. The claimant stated at the hearing that his HIV
status was stable, consistent with the longitudinal medical evidence of record
indicating that the claimant has been asymptomatic throughout the relevant period.

10 (*Id.* at 20.)

11 Plaintiff argues that the ALJ did not provide specific, clear, and convincing reasons for
12 discounting Plaintiff's statements regarding the intensity, persistence, and limiting effects of his
13 symptoms. (Pl.'s Mot. at 12-13.) The Court agrees.

14 With respect to the statement Plaintiff made to his treating physician, the doctor's treatment
15 relationship with Plaintiff dates back to 2004, and the ALJ identified only one statement reflecting
16 a purported intent to disregard prescribed and necessary treatment for secondary gain. (AR at 20.)
17 Moreover, the ALJ did not find that Plaintiff actually discontinued treatment or that Plaintiff was
18 malingering.³ Indeed, the ALJ found that Plaintiff's HIV status was stable. (*Id.*) This suggests
19 that Plaintiff adhered to his treatment regimen. In fact, Plaintiff's compliance with his prescription
20 routine is documented in Dr. Wilson's treating notes, which indicate Plaintiff takes 95-100% of his
21 HIV medications. (*See, e.g.*, AR at 231, 237, 246, 252.)

22 The ALJ's reliance on Plaintiff's alcohol and drug use is also problematic. As Plaintiff
23 argues, his alcohol and drug use was not so significant that it was considered a "severe"
24 impairment at step two. (Pl.'s Reply at 5.) Additionally, the ALJ did not make any finding as to
25 the materiality of Plaintiff's alcohol and drug use. *See, e.g.*, 42 U.S.C. § 423(d)(2)(C) ("An
26 individual shall not be considered to be disabled for the purposes of this subchapter if alcoholism

27 ³ Such a finding would have been contrary to Dr. Wilson's opinion. AR at 500. She indicated that
28 Plaintiff is not a malingerer. *Id.*

1 or drug addiction would (but for this subparagraph) be a contributing factor material to the
2 Commissioner's determination that the individual is disabled."); 20 C.F.R. § 416.935(b)(2)(ii) ("If
3 we determine that your remaining limitations are disabling, you are disabled independent of your
4 DAA and we will find that your DAA is not a contributing factor material to the determination of
5 disability."). Absent any such findings, Plaintiff's alcohol or drug use is not a clear and
6 convincing reason for discrediting Plaintiff's testimony. *See La Patro v. Barnhart*, 402 F. Supp.
7 2d 429, 433 (W.D.N.Y. 2005) ("The ALJ misunderstood how plaintiff's alcohol dependence
8 should be considered in determining whether she is disabled. The ALJ incorrectly found that
9 plaintiff's alcohol dependence was a reason to find her testimony regarding her limitations not
10 credible. This is error."). For these reasons, the ALJ erred when evaluating Plaintiff's credibility.

11 2. Mr. Williams' statements

12 Plaintiff's partner, Thomas Williams, submitted a third party function report dated
13 September 7, 2011. (AR at 181-191.) The ALJ "appreciate[d] his perspective," noted that Mr.
14 Williams' allegations mirrored Plaintiff's, but found that the statements were "generally not
15 credible" because "Mr. Williams is not a disinterested party." (*Id.* at 17.)

16 In her opposition, the Commissioner argues that the Court should read this part of the
17 ALJ's decision as suggesting that because Plaintiff's statements were inconsistent with the medical
18 evidence, and Mr. Williams' statements were similar to Plaintiffs, then Mr. Williams' statements
19 were also inconsistent with the medical evidence. (Def.'s Opp'n at 15.) The ALJ, however,
20 discounted Plaintiff's statements for other reasons, namely, his drug and alcohol use, his stable
21 HIV status, and his purported intent to disregard prescribed and necessary treatment for secondary
22 gain. (AR at 20.) It is unclear, then, how this Court can properly assume that these reasons also
23 justify the ALJ's finding that Mr. Williams was not credible.

24 Nor is it clear, on this record, that the ALJ's failure to link these reasons directly to Mr.
25 Williams was harmless, as the Commissioner seems to suggest in her opposition. (*See* Def.'s
26 Opp'n at 15.) In the disregarded third party function report he provided, Mr. Williams stated: "I
27 don't think he realizes how bad his memory has gotten. He forgets my name sometimes & we've
28 been together 10 years." (*Id.* at 191.) Had the ALJ found Mr. Williams credible, his statements
would have impacted the non-severity finding at step two. *See Nguyen v. Chater*, 100 F.3d 1462,

1 1467 (9th Cir. 1996) ("Lay testimony as to a claimant's symptoms is competent evidence which
2 the Secretary must take into account . . . unless he expressly determines to disregard such
3 testimony, in which case 'he must give reasons that are germane to each witness.'").

4 This Court has appropriately limited its review of the ALJ's adverse credibility
5 determination to the express reason given by the ALJ himself, i.e., that Mr. Williams is not a
6 disinterested party. *See Orn*, 495 F.3d at 630 (The court "may not affirm the ALJ on a ground
7 upon which the he did not rely."). This is not, in and by itself, a proper reason to discount Mr.
8 Williams' statements. *See Smolen*, 80 F.3d at 1289 (ALJ erred in rejecting the testimony of the
9 claimant's family members, who, according to the ALJ, were "understandably advocates, and
10 biased."). *Cf. Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (ALJ did not err in rejecting
11 statements of claimant's former girlfriend where he considered her close relationship with the
12 claimant, she was possibly influenced by a desire to help him, and her statements were
13 inconsistent with the claimant's presentation to treating physicians during the period at issue and
14 the claimant's failure to participate in cardiac rehabilitation). The ALJ, therefore, erred in
15 discounting Mr. Williams' statements.

16 **B. Whether the ALJ erred at steps two and five**

17 To the extent the ALJ's step two analysis, and consequently, his hypotheticals to the VE,
18 were informed by his unsupported adverse credibility determinations, the ALJ must also revisit
19 those aspects of his decision on remand.

20 At step two, the ALJ determines whether a claimant's impairment or combination of
21 impairments is "severe." *Reddick*, 157 F.3d at 721. In this case, the ALJ found that Plaintiff's
22 mental impairments were not severe. (AR at 13.) The ALJ's finding at step two was based, in
23 part, on Plaintiff's testimony. (*See id.* ("The evidence of record, including the testimony of the
24 claimant, supports a finding that the above medical impairments [HIV and bilateral knee pain]
25 significantly limit his ability to perform basic work activities. The undersigned therefore finds
26 that they are severe.").) To the extent the ALJ erroneously rejected certain parts of Plaintiff's
27 testimony and that finding impacted the ALJ's non-severity finding with respect to Plaintiff's
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1 alleged mental impairments, the ALJ also erred at step two.⁴

2 Similarly, to the extent the ALJ erred in finding Plaintiff's mental impairments non-severe,
3 the ALJ's hypotheticals to the VE were similarly flawed. At step five, the burden shifts to the
4 Commissioner, who must show that Plaintiff is not disabled and can engage in work that exists in
5 significant numbers in the national economy. *Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012).
6 The ALJ may meet this burden met by "asking a vocational expert a hypothetical question based
7 on medical assumptions supported by substantial evidence in the record and reflecting all of the
8 claimant's limitations, both physical and mental, supported by the record." *Id.* If, however, the
9 ALJ's question to a VE fails to include all of the impairments from which the claimant suffers,
10 then the expert's testimony cannot constitute substantial evidence upon which to base a conclusion
11 that the claimant is not entitled to benefits. *Id.* at 1162.

12 Here, the ALJ erroneously rejected certain testimony, and as a result, he declined to
13 include certain limitations in the hypotheticals he posed to the VE. In his first hypothetical, the
14 ALJ asked the VE to consider an individual with "an RFC of light," and the same age, education,
15 and work experience as Plaintiff. (AR at 625.) The VE testified that such an individual would not
16 be able to perform Plaintiff's past relevant work but would be able to perform other jobs. (*Id.*)

17 In his second hypothetical, the ALJ asked the VE to consider an individual who had the
18 same age, education, and work experience as Plaintiff and who was able to (1) lift and carry 50
19 lbs. occasionally and 25 lbs. frequently, (2) stand and walk for two hours but only for 45 minutes
20 at a time, (3) sit for six hours but only up to two hours at a time, and (4) occasionally stoop,
21 crouch, climb ladders, ropes, and scaffolds. (*Id.* at 626.) This individual would also miss one day
22 of work per month due to medical reasons. (*Id.*) In response to this hypothetical, the VE testified
23 that such an individual could not perform Plaintiff's past relevant work. (*Id.* at 626-628.) The
24 ALJ then asked the VE to consider whether an individual with the same limitations could perform
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27 ⁴ Because the ALJ must revisit his analysis at step two in light of his unsupported credibility
28 determinations, the Court need not address Plaintiff's arguments that the ALJ applied the wrong
legal standard or that the ALJ's finding of non-severity was not supported by substantial evidence.
On remand, however, the ALJ shall ensure that he adheres to the applicable standards when
reexamining his step two analysis.

1 sedentary work. (*Id.* at 628.) The VE responded that such an individual could work as a
2 surveillance systems monitor, an assembler, or a semi-conductor assembler. (*Id.* at 628-629.)
3 Finally, the ALJ asked the VE to consider scenarios in which the hypothetical individual (1) could
4 not consistently work a full-time schedule, (2) would miss two or three days of work per month
5 due to illness or other reasons, (3) would have to leave work suddenly (and without notifying a
6 supervisor) in the middle of the day because of pain or other symptoms on a consistent basis, and
7 (4) would be off task 25% of the time. (*Id.* at 630-631.) The VE testified that such an individual
8 would be unemployable. The ALJ, however, did not incorporate any of these limitations in
9 reaching his non-disability finding. (*Id.* at 16.)

10 The ALJ crafted hypotheticals that did not include limitations stemming from Plaintiff's
11 mental impairments. (*See id.* at 622-631.) To the extent that the ALJ did so based on his
12 unsupported rejection of Plaintiff's testimony and the statements of his partner, the VE's responses
13 to the ALJ's hypotheticals cannot support the ALJ's non-disability finding. *See Hill*, 698 F.3d at
14 1161; *see also Stillwater v. Comm'r of Soc. Sec. Admin.*, 361 Fed. App'x 809, 813 (9th Cir. 2010)
15 (remanding for further proceedings where ALJ's hypothetical was based on his improper rejection
16 of three doctors' opinions, plaintiff's testimony, and lay witness statements). Accordingly, the
17 Court finds that the ALJ also erred at step five of the disability determination.

18 IV. CONCLUSION

19 For the reasons set forth above, Plaintiff's motion for summary judgment is GRANTED,
20 Defendant's cross-motion for summary judgment is DENIED, and this case is REMANDED for
21 further proceedings consistent with this order.

22 **IT IS SO ORDERED.**

23 Dated: 02/18/16

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25 KANDIS A. WESTMORE
26 United States Magistrate Judge
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